BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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In the Matter of	)	
	)	
Leased Commercial Access	)	CS Docket No. 96-60

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

COMMENTS OF TIME WARNER CABLE

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Time Warner Cable, a division of Time Warner Entertainment Company, L.P. ("Time Warner Cable"), hereby submits its Comments in the above-captioned proceeding.[1] Time Warner Cable includes with these Comments a paper entitled, "An Economic Analysis of Commercial Leased Access Pricing," prepared by Dan Kelley of Hatfield Associates, Inc. ("Economic Analysis").

I. INTRODUCTION AND SUMMARY.[2]

The Commission's analysis in the Notice is premised on the faulty assumption that the lack of demand for commercial leased access ("CLA") is caused by an unjustifiably high CLA rate and,

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1 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Commercial Leased Access, CS Docket No. 96-60, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-122 (released March 29, 1996) ("Notice").

2 Time Warner continues to believe that government imposed leased access requirements violate the First Amendment. That issue is now sub judice before the United States Court of Appeals for the District of Columbia Circuit. See Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993), appeal pending.

consequently, that demand can be increased by lowering the rate. In actuality, the lack of demand is a function of the fact that the economic model for CLA is fundamentally at odds with the realities of the programming business. Unlike the current model, in which cable operators compensate programmers for the right to carry their services, CLA programmers generally pay the cable operator for carriage. This arrangement, coupled with the fact that CLA is a system-by-system approach which eliminates the economies of scale available through national distribution, means that CLA programming will usually be of inferior quality. It is no wonder that demand for CLA is low.

Moreover, Congress's goal in adopting CLA -- to increase the source and content diversity of programming -- has already been achieved by the cable industry. Consumers have available a vast and diverse range of high quality program services from a broad array of program providers. This is not surprising because it is critical to cable operators' financial success that they provide a package of programming that appeals to a broad spectrum of consumer tastes. Thus, it is not necessary for the Commission to engage in creative regulatory economics in order to create demand for CLA.

This is particularly true because any effort to pump up demand for CLA will reduce consumer welfare. CLA inherently produces programming that consumers do not value and often find offensive. A recent in-house survey conducted by Time Warner

Cable revealed that infomercials constitute nearly 70 percent of CLA programming on its systems. Nearly 60 percent of Time Warner Cable subscribers surveyed said they would pay nothing for the CLA programming on their system. In addition, consumers are often outraged at sexually explicit CLA programming, such as the "Life Without Shame" program Time Warner Cable is forced to carry on its Rochester, New York system. Particularly since it is not required to do so, the Commission cannot seriously want to adopt a rule that requires cable operators to carry the glut of infomercials and sexually explicit programming that CLA produces.

Modification of the CLA rules also would harm programmers. As the Commission knows, many cable systems today are channel-locked (for example, well over 90 percent of Time Warner Cable's systems have no unused channel capacity). Thus, to the extent that changes in the rules create artificial demand for CLA, it will come at the expense of high-quality, non-CLA programmers, particularly start-up services and those with loyal but relatively small audiences. Producing quality cable programming services already is an expensive and risky proposition. The Commission should avoid taking any action which makes the task even more difficult.

Finally, the Commission's proposed CLA rate formula would violate its statutory obligation to "assure that [CLA] use will not adversely affect the operation, financial condition, or market development of the cable system." Cable operators are in the business of creating program packages that appeal to a broad spectrum of consumers. Dropping services reduces the overall value subscribers attach to the package, particularly where the dropped services are valued and the replacement services are not. However, the proposed CLA formula would not allow operators to recover costs associated with loss of subscribers. The potential subscriber loss is particularly relevant because cable operators face rapidly escalating competition from DBS, MMDS, telco OVS operators, and other MVPDs that do not have CLA obligations. Thus, to the extent CLA reduces the attractiveness of a cable operator's offering, consumers have alternatives. It would be arbitrary and capricious for the Commission to conclude that because these costs may be difficult to quantify it will simply ignore them.

In addition, the Commission's proposed CLA formula would not permit recovery of substantial direct and opportunity costs associated with CLA. These costs include additional personnel and equipment, customer notification, modifications to the billing system, potential contract termination costs for dropped services and increased administrative and regulatory costs.

The Economic Analysis attached to these Comments demonstrates that if the direct and opportunity costs of CLA are fully accounted for, the resultant CLA rate would be <u>higher</u> than the current average CLA rate. Under these circumstances, it would be particularly inappropriate for the Commission to <u>lower</u>

the current rate. Such an action would clearly violate the statutory "no harm" standard.

II. THE COMMUNICATIONS ACT PROHIBITS THE COMMISSION FROM ADOPTING THE PROPOSED CLA RULES BECAUSE SUCH RULES WOULD ADVERSELY AFFECT THE FINANCIAL CONDITION OR GROWTH AND DEVELOPMENT OF CABLE SYSTEMS.

Congress recognized that CLA had the potential to impose a significant economic hardship on cable operators. Wishing to avoid this result, it created presumptions within section 612 that favor the cable operator. Most importantly, it stated that the CLA rate should be "at least sufficient to assure that [CLA] use will not adversely affect the operation, financial condition, or market development of the cable system."[3] It is significant that Congress declined to eliminate this "no harm" standard in the 1992 amendments to CLA or in the 1996 overhaul of the Communications Act. Similarly, Congress gave cable operators the right to establish the rate for individual CLA programmers and attached to that right a presumption of reasonableness.[4]

These presumptions are designed to ensure that cable operators are not financially harmed by the imposition of CLA. As demonstrated herein and in the attached Economic Analysis, the proposal in the Notice to lower the CLA rate to pump up demand for CLA capacity plainly would "adversely affect" the operation,

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3 Notice at ¶ 26; Communications Act of 1934, as amended § 612(c)(1) ("Communications Act"), 47 U.S.C. § 532(c)(1) (emphasis added).

4 Communications Act § 612(f), 47 U.S.C. § 532(f).

financial condition and marketing development of cable operators. Thus, the proposal is in direct conflict with the Act.

As an initial matter, the Commission must recognize that cable operators have broad editorial discretion to select programming services.[5] In fact, the program selection function is the sine qua non of the cable operators' business. As discussed more fully below, it is the ability to select programs that enables cable operators to create packages that appeal to a broad range of consumers. CLA, by its nature, restricts this editorial function. If the financial condition and market development of cable operators is to be protected, as is required by the Act, it is imperative that the Commission attempt to minimize, not maximize, the affect of CLA on cable operators' right to choose programming. This is particularly true becasue the Commission has a constitutional, as well as a statutory, obligation to minimize the impact of CLA on cable operators' editorial function.[6]

This interpretation is supported by section 621(c) of the Communications Act which specifically exempts "cable services"

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5 FCC v. Midwest Video Corp., 440 U.S. 689, 707, 59 L.Ed 2d 692, 99 S. Ct 1435 (1979).

6 See Turner Broadcasting System, Inc. v. FCC, 512 U.S. ---, 129 L.Ed 2d 497, 514, 114 S Ct 2445 (1994). ("[C]able operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment," citing Leathers v. Medlock, 499 U.S. 439, 444, 113 L. Ed 2d 494, 111 S Ct 1438 (1991).)

from common carrier regulation.[7] The Supreme Court held in Midwest Video that previous Commission rules that: (1) required cable operators to hold out specific channels on a first-come, first-served, non-discriminatory basis; and (2) limited what operators could charge for access, resulted in the de facto imposition of common carrier obligations on cable operators, in direct contravention of the Communications Act.[8]

The Commission's proposed cost-based CLA rate formula, as well as its proposed "first-come, first-served" access guarantee,[9] are similar to the historical common carrier requirements imposed on telecommunications companies and public utilities and, therefore, violate section 621(c) and the Supreme Court's holding in Midwest Video.

Further, as noted, cable operators are in the business of creating packages of programming that appeal to a broad spectrum of consumers. Dropping channels (or not adding attractive

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[7] Communications Act § 621(c); 47 U.S.C. § 541(c). "Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." Id. Indeed, in the 1984 House Report, Congress explicitly stated that, in terms of developing any new regulations relating to the price charged CLA programmers for access, "the Commission should not see its role as that of a traditional common carrier regulator." (emphasis added). H.R. Rep. No. 934, 98th Cong., 2d Sess. at 54 (1984) ("1984 House Report").

[8] FCC v. Midwest Video Corp., 440 U.S. 689, 702 (1979). The fact that Congress adopted CLA requirements for cable operators after the Midwest Video decision does not authorize the Commission to implement CLA using common carrier type regulations. In fact, as noted, in 1984, after Midwest Video, Congress expressly prohibited such regulations.

[9] Notice at ¶ 128.

channels) reduces the overall value subscribers attach to the package. In Time Warner Cable's experience, dropping pre-existing channels, even niche channels with relatively small audiences, is the action most likely to trigger a strong negative reaction among consumers. This problem is especially acute where the programming dropped is replaced by programming that subscribers do not value or actually find offensive (as demonstrated below, this is the typical experience with CLA programming).[10] Yet, this is precisely what the Commission's proposal would do. As such, it cannot help but "adversely affect" the financial condition and market development of cable systems and, therefore, is not permitted by the Act.

The proposed changes to CLA are all the more unjustified because the Commission has proffered no evidence that denial of CLA access is commonplace, let alone widespread. In fact, in the three years since adoption of the current rules, only 71 CLA complaints have been filed at the Commission (and hardly any cases have been filed in the federal courts). Thus, at most, only .7 percent of all cable systems have been the subject of CLA complaints.[11] Moreover, many of these complaints have been

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[10] Moreover, subscribers inevitably blame the cable operator for the carriage of offensive or non-valued programming, notwithstanding that the operator is simply acting in accordance with its statutory obligations. Although this negative public perception is difficult to quantify, it cannot be underestimated.

[11] Indeed, the Commission cites only six CLA programmers that have sought to overturn the current CLA rules. Notice at ¶¶ 19-21.

dismissed by the Commission for a variety of reasons.[12] There is no evidence that cable operators generally have unreasonably denied subscribers diverse information sources by refusing to carry CLA programmers. In the absence of such evidence, the legal basis for adopting a rule which so clearly is at odds with Congress's admonition against harming cable operators is particularly weak.[13]

The Commission's primary justification for abandoning the highest implicit fee formula -- that it results in "double billing"[14] -- is similarly unpersuasive. As explained in the Economic Analysis, all channels are not of equal value.[15] In fact, consumers place litte or no value (or negative value) on CLA programming. In effect, operators receive no payment from consumers for such programming and, therefore, no double billing occurs as a result of the current CLA scheme.

Moreover, the Commission has failed to appropriately consider the potential that its proposed rule change could induce

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12 See, e.g., Karl Schroll v. Comcast Cable Communications of Philadelphia, Inc., DA 96-286 (released March 12, 1996) (dismissing the complaint after the cable operator demonstrated that the complainant had been satisfied and the complainant failed to provide a statement of why the prosecution should continue); Paul V. Engle v. Cable TV Fund 14-1, Ltd, DA 96-274 (released March 11, 1996) (dismissed as moot).

13 Moreover, it is clear that conjecture is no substitute for real evidence. Turner Broadcasting System, Inc. v. FCC, 512 U.S. ---, 129 L.Ed 2d 497, 532, 114 S Ct 2445 (1994).

14 Notice at ¶ 29.

15 Economic Analysis at 21.

migration of premium or pay-per-view program services to leased access and that such migration could cause significant injury to cable operators in violation of the statute's "no harm" standard. In its decision implementing the current CLA provisions, the Commission rejected a cost-of-service approach to establishing maximum permitted CLA rates. One of the two reasons it cited for rejecting cost-of-service was the possibility "that substantial migration will occur under this approach, with uncertain and possibly harmful effects on the structure of the industry."[16]

The CLA rate formula proposed in the Notice is a cost-of-service approach. However, the Commission does not discuss the potential impact of migration in the Notice. Time Warner Cable is unaware of any changed circumstances that would impact the Commission's previous decision on migration. To the contrary, it appears that the potential for programmer migration is still very much an issue that could "adversely affect" the financial and operational condition, as well as the market development of cable systems. The Commission must give analytic weight to the possible effect of migration or justify its failure to do so. That the Commission must explain departures from prior findings is, of course, a fundamental precept of administrative law.[17]

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[16] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 F.C.C.R. 5631, 5949 (1993).

[17] See, e.g., Achernar Broadcasting Co. v. FCC, 62 F.3d 1441, 1449 (D.C. Cir. 1995); Telephone and Data Systems v. FCC,

Finally, CLA imposes substantial direct and opportunity costs on cable operators which are not fully accounted for in the Commission's proposed rate formula. In particular, the opportunity costs associated with lost subscribers could be very high. These direct and opportunity costs are described in detail below and in the attached Economic Analysis.

A. Opportunity Costs.

In the Notice, the Commission proposes to establish a new formula for determining the maximum rate cable operators may assess for CLA.[18] Where CLA set-aside capacity is not fully subscribed, the Commission tentatively concludes that the maximum CLA rate should be based on the costs of operating the cable system as well as additional CLA costs, including opportunity costs and a reasonable profit.[19] However, the proposed formula systematically understates the opportunity costs to operators of providing CLA.

One of the most important opportunity costs eliminated by the proposed formula is CLA's likely adverse affect on subscriber penetration. The Commission tentatively concludes that the cost formula should not reflect revenue foregone due to reduced subscribership because valued programming is dropped and replaced

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19 F.3d 42, 49 (D.C. Cir. 1994). (Commission may not "blithely cast [] aside" prior conclusions without a reasoned explanation.)

18 Notice at ¶ 65, 66.

19 Id. at ¶ 66.

with relatively unvalued CLA programming.[20] In the Commission's view, such foregone revenues are "too speculative to measure accurately."[21] However, these opportunity costs are reasonably quantifiable, as demonstrated in the attached Economic Analysis. Moreover, the economics of the cable business dictate that reducing cable operators' ability to package and market programming in order to maximize subscriber penetration exacts a substantial hardship on cable operators. This is the most direct and severe financial impact of CLA on an operator. Hence, the Commission's proposal to ignore these opportunity costs would be directly contrary to the statute's requirement that CLA not harm the financial condition and market development of cable systems.[22]

Operators seek to offer programming that will maximize subscriber penetration, and thereby maximize profits. The mix and quality of the program package is important. Some programming is included in a package due to its universal appeal; other programming is included to satisfy highly-targeted or niche demand. Cable operators seek to maximize subscriber demand by reflecting a full range of interests in the programming they

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20 Id. at ¶ 86.

21 Id.

22 See Communications Act § 612(c)(1); 47 U.S.C. § 532(c)(1).

offer.[23] However, replacing a channel selected by the cable operator with a channel required by CLA not only will alter the dynamics of a programming package, it unquestionably will inhibit its value to subscribers.

In addition, quality programming generally cannot develop under a CLA scheme in which the programmer pays the operator for carriage. This is due to the underlying economics of the programming business. As noted above, it is expensive to produce high quality programming. Many new networks spend $150-$200 million and more to launch their services;[24] in fact Microsoft and NBC plan to spend $620 million to roll out "MSNBC."[25] "Speedvision," a new network targeted to vehicle enthusiasts, projects break-even at $80-$90 million.[26] Cable operators pay for the right to carry such programming, and these payments help finance the costs of production. Under leased access, that relationship is generally reversed.

Similarly, the high cost of programming requires that programmers (including niche or targeted programmers) seek

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23 See Economic Analysis at 14. "By identifying customer demand and building a programming line-up designed to maximize subscription, consumer welfare is increased." Id.

24 See "The Birth of New Networks: A Comprehensive Guide to Tomorrow's Cable Programming," Cablevision: New Network Handbook (Special Supplement) (1996) at 16A.

25 Id. at 12A.

26 Id. at 10A.

economies of scale through nationwide distribution. As described by several noted economists:

> By supplying identical programs to many [systems], networks both increase the financial base available to fund program production, enabling more expensive programs to be produced, and reduce the per-viewer costs of producing and distributing any given program. . . These elementary and unalterable principles explain why nationally distributed television programming will usually have greater viewer appeal than programs produced and aired only locally.[27]

For example, "Speedvision" projects break-even at 25 million subscribers, while new programmer "Ovation" indicates that 14 million subscribers will be required to break-even. These programmers achieve such penetration by entering into national distribution agreements with large multiple system operators. Transaction costs render it simply uneconomic to pursue carriage agreements on a system-by-system basis. CLA, with rates and access availability determined on an individual system basis, inherently requires system-by-system agreements. This runs counter to the economics of programming, which "dictate that audiences be maximized through widespread distribution."[28]

Thus, if an operator-selected program service is dropped, it will most likely be replaced with a CLA service of much lower quality and, therefore, low, no, or negative consumer appeal. As

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27 See, e.g., Besen, Krattenmaker, Metzger, Jr. and Woodbury, Misregulating Television: Network Dominance and the FCC, at 5 (Chicago: 1984).

28 Economic Analysis at 10.

described above, this is the typical situation with CLA programming. This will reduce the value of the operator's program offering, which in turn would result in loss of subscribers, and thereby adversely affect the cable system's "operation, financial condition, and market development." This is supported by the attached Economic Analysis, which concludes that "[w]ith the reduced consumer satisfaction that is likely if programs are displaced by leased access, there is an obvious risk of subscription cancellations as programs valued by certain consumer segments are replaced."[29]

The potential for lost subscribership is particularly relevant because cable operators face rapidly escalating competition from DBS, MMDS, telco OVS operators, and other MVPDs. These MVPDs do not have commercial leased access obligations (or, for that matter, other mandatory carriage obligations such as must carry and public, educational and governmental access) and, therefore, are free to provide consumers with the most attractive programming package. The more cable operators are limited in their ability to make market-based programming decisions, the more likely consumers are to migrate to alternative distributors.

Competitors recognize that CLA gives them a regulatory advantage and are not hesitant to exploit that advantage. For example, Liberty Cable, a SMATV operator in New York City, has aggressively advertised its carriage of Turner Classic Movies and

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[29] Id. at 14.

nine other services, highlighting the fact that such services are not carried on Time Warner's Southern Manhattan system. Time Warner Cable does not carry these services in Southern Manhattan because it lacks channel capacity on that system, due in large part to the CLA rules. As noted in the attached Economic Analysis, "[a] subscriber that values one particular service very highly is obviously likely to cancel if that service is dropped. This is particularly true if a competitor begins offering the service. . . ."[30]

The Economic Analysis quantifies this opportunity cost. Assuming per-subscriber revenues of $32 per month (less avoided costs), if the subscriber base falls by only 2.5 percent due to loss of valued programming or the addition of objectionable programming, the opportunity cost of adding the CLA channels would be 57 cents per month per remaining subscriber.[31]

This assumption about potential lost subscribership is not at all speculative and is, in fact, very conservative. If CLA capacity were fully utilized, it could require cable operators to drop a significant number of popular channels. For example, a system with 60 activated channels (excluding must carry channels) could be required to devote nine channels to CLA programming which consumers do not value or that they find offensive. Such a

30 Id. at 19.

31 These calculations are set out in more detail in the Economic Analysis. Id. at 19-20.

result could effectively cripple a cable operator; indeed, a recent survey indicated that 51 percent of cable subscribers cited "more, better programming" as the main reason they would consider dropping cable in favor of an alternative MVPD.[32] The conservative nature of the assumption is also borne out by the fact that alternative MVPDs have demonstrated an ability to siphon a significant percentage of subscribers away from cable operators.[33] Thus, there is record evidence that cable subscribers are prepared to switch to an alternative MVPD if the proposed changes to CLA diminish the perceived value of cable service.[34]

Of course, other opportunity costs, as well as the direct costs described below and in the Economic Analysis, would have to be added to this calculation in order to accurately reflect the

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[32] Thomas P. Southwick, "Are Subscribers Ready To Switch? You Bet. . . And Pricing Is The Key," Cable World, at 178 (April 29, 1996).

[33] For example, FutureVision, an MVPD offering video services on Bell Atlantic's video dialtone system in Dover, New Jersey, reports that "three out of four homes that have been offered the new service have signed up for it" -- a total of 1,600 homes since January, 1996. See Alexandra Marks, "Phone Co. Competes With Cable TV in N.J.," The Christian Science Monitor at 13 (April 22, 1996). Moreover, US West TeleChoice recently announced that it surpassed 10,000 subscribers -- representing more than a 30 percent market share of the existing cable households in its service area. See "US West TeleChoice to Continue Video Service in Omaha After Reaching 10,000 Subscribers," Tele-Service News (April 1, 1996).

[34] And, as discussed above, the Commission is not free to reject these costs because it deems them speculative. It must credit the presumption that such costs are quantifiable and actually incurred by the cable operator.

overall cost of CLA. In short, CLA costs easily would exceed the average CLA rate of 50 cents per subscriber under the current maximum implicit fee formula.

Moreover, the opportunity costs resulting from lost subscribers would be further increased by two particular issues raised in the Notice. First, the proposal to mandate first-come, first-served selection of CLA programmers will undermine an operator's ability to create a package of varied services which meets consumer demand and maximizes penetration.[35] Second, a mandatory tier placement requirement would thwart a cable operator's ability to package programming for maximum subscriber appeal.[36]

B. Direct Costs.

The proposed CLA rate formula does not adequately account for the direct costs to the cable operator of accommodating CLA programmers. These costs, which do not clearly fall within any of the categories of "opportunity costs"[37] identified in the

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35 Notice at ¶ 128.

36 Notice at ¶ 119. In fact, the Commission is prohibited from mandating tier placement for CLA programming by section 624(f)(1) of the Communications Act which specifies that no federal agency, state or franchising authority may "impose requirements regarding the provision or content of cable services, except as expressly provided in this title." 47 U.S.C. § 544(f)(1).

37 The Commission defines "opportunity costs" to "include the reasonable costs. . . that the operator incurs by leasing the channel to the leased access programmer that it would not have incurred had it continued with the current use of the channel." Notice at ¶ 79.

Notice, are described below and in the attached Economic Analysis.

To accommodate most CLA programmers, cable operators will find it necessary to hire additional personnel. CLA programmers typically provide their programming to cable operators in a video tape format. Depending on the number of new CLA programmers generated by the change in the rules, this could require the addition of 10 personnel: 2 tape librarians, 5-6 people in master control, 1 additional person for billing, and possibly 1 person to screen tapes that are submitted.

Operators also will experience additional equipment and infrastructure costs to accommodate increased CLA usage. These costs may include up to 100 square feet of floor space and thousands of dollars worth of equipment. Equipment costs could exceed $100,000 if switching equipment must be replaced.

There are also potential CLA costs related to customer notification and billing. Many systems notify subscribers each time the channel line-up is altered (i.e., an existing programming service is bumped or repositioned to accommodate a CLA program). This typically costs 50¢ per subscriber. Moreover, in some cases operators may find it necessary to redesign their channel line-up and provide new channel guides when a change is made. The addition of pay-CLA programmers will impose additional costs because operators will be required to modify their billing systems. These costs should be recovered from the CLA programmer which causes the costs to be incurred, i.e., separately from the maximum rate formula.

Dropping existing programming services to add new CLA programmers would generate additional administrative and regulatory costs. More employees and other resources would be required to respond to subscriber complaints. For example, one channel replacement on a Time Warner Cable system generated 400 calls to the system's manager; another resulted in picketing of the system's offices. In addition, consumer dissatisfaction resulting from channel dislocations jeopardizes Time Warner Cable's relationships with franchising authorities and makes subscribers feel that Time Warner Cable is not responsive to their programming preferences. Similarly, compliance with increased CLA regulatory requirements also will add regulatory costs, particularly if the Commission's proposed "cost" based maximum rate formula is adopted. All of these dynamics constitute costs to Time Warner Cable.

As pointed out in the Economic Analysis, it is important to note that "[m]any of these expenses are fixed in nature. That is, even if demand for only a segment of one channel materializes, all, or a large portion of the costs would still have to be incurred."[38]

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38 Economic Analysis at 12.

Finally, the "market" component of the proposed CLA formula is no answer to the cable operator harms identified throughout these comments. First, programmer dislocation and migration will occur up until the point at which the cable system fills its CLA channels, so that any such CLA pricing flexibility will come too late after significant financial damage has already been done to the cable system, contrary to the statute. Second, since the system may for whatever reason never entirely fill its CLA channels, it may never be able to implement the market rates, so that the financial harm imposed on the system would be chronic and persisting. Last, the fact that the cable operator's ability to charge market rates to leased access programmers is inextricably linked to the operator's carriage of multiple programmers invites collusive behavior on the part of the CLA programmers to prevent the charging of higher rates. In short, the "market" component of the Commission's proposed test is simply unworkable and certainly provides no answer to or justification for the financial havoc which the cost-based component of the formula will wreak on cable systems.

III. THE LACK OF DEMAND FOR CLA IS A FUNCTION OF THE ECONOMICS OF CLA AND DOES NOT JUSTIFY A CHANGE IN THE COMMISSION'S CURRENT COMMERCIAL LEASED ACCESS RULES.

A. Congress Intended Commercial Leased Access As A "Safety Valve," Not A Financial Subsidy For Commercial Leased Access Programmers.

Congress established CLA to "assure the widest possible diversity of information sources to the public" consistent with

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the growth and development of cable systems.[39] When section 612 was adopted in 1984, Congress was concerned that programmers unaffiliated with cable operators were not able to obtain cable carriage. In comparison with today, channel capacity and programming sources in 1984 were more limited, and many of the available programming services were affiliated with cable operators. Congress thus hoped that section 612 would promote the development of unaffiliated programmers and encourage diversity of information sources.[40]

However, Congress did not intend that a cable operator must necessarily devote all designated CLA capacity to CLA programmers. In fact, Congress expressly recognized that CLA capacity might not be fully subscribed and provided in section 612(b)(4) that any unused CLA capacity should be available for programming selected by the cable operator.[41] Had Congress intended that all CLA capacity must be used for CLA programmers, it would have designated that capacity for the exclusive use of such programmers. It did not. Instead, it required capacity to be used for leased access only if demand existed. Thus, any

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39 Communications Act § 612(a), 47 U.S.C. § 532(a).

40 S. Rep. No. 92, 102nd Cong., 1st Sess. at 29-30 (1992) ("1992 Senate Report").

41 Although Congress in 1992 added to the statutory purpose of leased access the promotion of "competition in the delivery of diverse sources of video programming," it did not change the provisions permitting the use of CLA capacity by cable operators, nor did it reject the original goals of CLA. Communications Act § 612(a), 47 U.S.C. § 532(a).

effort by the Commission to create demand for CLA by manipulating the CLA rate formula is inconsistent with the CLA scheme Congress created.

Moreover, CLA was intended to foster a diversity of programming sources. As Representative Wirth, the original author of the CLA provision, stated in a 1984 hearing before the House Telecommunications Subcommittee, "access is not the goal; diversity is the goal."[42] In other words, if diversity develops as a result of marketplace forces, independent of CLA, there is no need for the Commission to engage in creative regulatory economics to jump-start CLA. As discussed below, it is clear that diversity has developed.

Similarly, it is clear that Congress did not intend CLA as a subsidy for programmers. Section 612(b) of the Act requires that cable operators set aside channel capacity for commercial use by programmers unaffiliated with the cable operator.[43] Congress specifically contemplated that CLA would be available to programmers who could pay market rates for a cable system's valuable channels.[44] Congress created a wholly different mechanism for non-profit programmers who could not afford market

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[42] Options for Cable Legislation: Hearings on H.R. 4103 Before the Subcommittee on Telecommunications Consumer Protection and Finance of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. 92 (1983).

[43] 1984 House Report at 48; Communications Act § 612(b)(1); 47 U.S.C. § 532(b)(1).

[44] 1984 House Report at 50.